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In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY
PROJECT, et al.,
Respondents.

Reply in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATEMENT REGARDING CORPORATE STATUS

Pursuant to Supreme Court Rule 29.6, a statement, explaining the corporate status of petitioners was previously filed with the Petition for Writ of Certiorari and there has been no change in corporate status since the petition was filed.

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INTRODUCTION

In Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), Appendix A-1, the Ninth Circuit again set unwarranted, heightened standards for environmental analysis that are found neither in the National Environmental Policy Act ("NEPA") nor the Council on Environmental Quality ("CEQ") regulations. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-53 (1989) (NEPA has no requirement that an agency prepare a mitigation plan); see, e.g., Amoco Production Co. v. Village of Gambel, 480 U.S. 531 (1987) (no automatic injunction for violation of environmental statutes).

THE NINTH CIRCUIT'S NEW NEPA STANDARDS

1. A Court May Consider Only Hard Data in the EA and Cannot Look to the Administrative Record.

First, the Ninth Circuit has created a new NEPA standard requiring that "hard data" supporting an agency's opinion be found in the environmental assessment ("EA") itself. An agency, however, should be able to rely on the administrative record in support of NEPA decisions, particularly when modern-day environmental analysis entails a large volume of information.[1]

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[1] In this case, the administrative record contains more than 3,000 pages. Essentially, the Ninth Circuit's decision mandates that every page of the administrative record be referenced in the EA if the agency relied upon it to support its decision.

In the one case decided within the Circuit since Blue Mountains, a district court followed the Ninth Circuit's new "hard data" standard to invalidate an environmental assessment. In Idaho Sporting Congress v. Rittenhouse, Civ. No. 98-0303-S-BLW (D. Idaho Feb. 25, 1999), the district court applied the new standard enunciated in Blue Mountains explaining that "[t]he Ninth Circuit has held that hard data supporting the experts' opinions must be either (1) found in the EA itself, or (2) contained in the administrative record and referred to by the EA." Petitioners' Appendix Supplement A-124, A-130. The court rejected a Forest Service expert's conclusion that timber salvage of dead and dying trees was necessary because of high insect populations. Even though the expert collected field data about insect populations, the court held the EA was insufficient under Blue Mountains unless the field data collection forms were included in the EA or specifically referenced in the EA. Id.

Similarly, in Blue Mountains, the Forest Service staff attempted, but were unable, to collect sedimentation data and instead estimated erosion potential using soil hazard maps and a soil scientist's on-the-ground review of proposed harvest units. A-43, A-71. Although the hard data was not in the EA, the administrative record contained the soil hazard maps and also the soil scientist's report on his field examination. That report explained his conclusions to delete certain harvest units and require low impact helicopters to remove logs on other harvest units. A-43, A-71 to A-72.

The Ninth Circuit's blinders approach, requiring that review not extend to the whole record but be limited to the EA and only those parts of the record referenced in the EA, leads to absurd results. For example, the Ninth Circuit

criticized the Forest Service conclusion that best management practices would reduce erosion from logging and road building in the Big Tower fire area, because the conclusion supposedly was based on observations of logging on unburned areas, and also because nothing in the EA supported the effectiveness of mitigation measures. A-14. In contrast, the district court reviewed both the EA and the administrative record and found that the Forest Service consulted with a sister forest which had experienced large wildfires and, more particularly, had reviewed the efficacy of best management practices to prevent sedimentation that were applied on salvage sales following wildfires in the same national forest and ranger district as the Big Tower Fire. A-71. In short, the very record that the Ninth Circuit refused to examine contained the allegedly-missing support for the agency's decision.

The Blue Mountains decision eviscerates the judicial doctrine of deference to agency expertise. In fact, the CEQ has emphasized that the EA need not contain the hard data demanded by the Ninth Circuit in Blue Mountains. The CEQ published its responses to the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations," including the question, "How long and detailed must an environmental assessment ("EA") be?" 46 Fed. Reg. 18026 (March 23, 1981). The response is telling: "Since an EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered." Id. at 18037 (emphasis added).

Respondents Blue Mountains Biodiversity Project, et al. ("Blue Mountains") urges the Court to deny the writ because the "underlying case involves a fact-specific

challenge." Blue Mountains Resp. Br. at 1. However, the Court need not engage in a fact-bound inquiry to decide whether an EA must include or specifically reference the hard data relied upon by an agency.

2. The Agency Cannot Contemplate Actions in the Same Geographic Area, but Must Propose all Actions at Once.

Second, the Ninth Circuit has created a new NEPA standard requiring the agency to transform contemplated actions into proposals if the actions are in the same geographic area. Although the Ninth Circuit and respondent contend the Court of Appeals followed this Court's decision in Kleppe v. Sierra Club, 427 U.S. 390 (1976), a careful review shows otherwise. Certainly, the Forest Service violated this Supreme Court precedent if it excluded pending proposals from the environmental document. However, neither respondent nor the Ninth Circuit point to any evidence to support the position that five proposed projects existed when the Big Tower Project was proposed. Although five projects were contemplated in the early post-fire stages, only three projects ripened into actual proposals. A58 to A-62.

The agency's decision to proceed with time-sensitive proposals, such as roadside hazard tree removal and the Big Tower sales, and to delay other, less urgent proposals is not contrary to NEPA. The opposite approach, in contrast, that the agency must convert all contemplated actions into proposals when it decides to proceed with some of the projects, is contrary to NEPA and this Court's holding in Kleppe. The actions cited by the Court of Appeals were

either categorically excluded from NEPA or were only contemplated actions. The district court correctly concluded that the Forest Service had a rational basis for moving forward with concrete proposals to harvest dead trees and the most intensively-burned areas.[2] A-34, A-58 to A-62. There were no proposed actions for the less severely burned areas, although the Forest Service contemplated eventual action in those areas. The Forest Service assessed the cumulative effects of both proposed and contemplated actions. A-73 to A-83. If contemplated actions ripen into proposals, their cumulative effects can be considered in greater detail.

Under its new standard, the Ninth Circuit requires that all contemplated actions for a similar geographic area be developed into proposals. Realistically, however, the Forest Service cannot do everything simultaneously. NEPA does not mandate that result, and the fact that a fire burned 50,000 acres does not change the law.

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[2] Respondent Blue Mountains incorrectly states that the only trees that survived the fire were scheduled for harvest. Blue Mountains Resp. Br. at 1-2. In fact, the only areas scheduled for harvest were where 90% of the trees did not survive the fire. A-24, A-35.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for Writ of Certiorari.

Respectively submitted,

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